# Roberta H. Gaston v. U.S. General Accounting Office

**Docket No. 99-02**

**Date of Decision: July 18, 2003**

**Cite as: Gaston v. GAO (7/18/03)**

**Before: Anne M. Wagner, Chair; Michael W. Doheny, Vice-Chair; Jeffrey S. Gulin, dissenting (in part)**

**Discrimination – Disability**

**Disability**

**Americans with Disabilities Act (ADA)**

**Reasonable Accommodation**

**Undue Hardship**

**Removal**

**Standard of Review**

**DECISION ON PETITIONER'S APPEAL FROM THE INITIAL DECISION OF THE ADMINISTRATIVE JUDGE**

This matter is before the Personnel Appeals Board (PAB) on Petitioner's appeal from the April 25, 2002 Initial Decision of the Administrative Judge (AJ). The Initial Decision sustained the action removing Petitioner/Appellant from employment at the U.S. General Accounting Office (GAO or Agency) based upon chronic absenteeism and repeated failure to follow leave procedures. The AJ also concluded that Appellant had failed to establish her affirmative defense premised on the Agency's alleged failure to provide a reasonable accommodation to her disability. Appellant, appearing *pro se* throughout these proceedings, broadly challenged the Initial Decision and requested review of her case by the full Board.

## I. Background

### A. Procedural History

The Petition for Review[1] (PfR) raised a number of claims that are outlined in the Initial Decision. Following the discovery period, the Agency filed a Motion to Dismiss and for Summary

[1] The Petition for Review was filed in this case on June 7, 1999. For relief, Appellant requested reimbursement for absent without leave (AWOL) charges from 1989 through September 19, 1998;

Judgment. The AJ ruled that the Motion to Dismiss be granted in part and denied in part,[2] and that Summary Judgment was inappropriate "because sufficient questions remained 'as to whether Petitioner was a qualified individual with a disability, whether the Agency's accommodation offer was reasonable under the circumstances, and whether discrimination was a component of Petitioner's employment situation'." Initial Decision at 3 (quoting Order of July 11, 2000).

After a four-day evidentiary hearing and the submission of post-hearing briefs, the Initial Decision was issued. Pursuant to the Board's regulations, Petitioner filed a Request for Reconsideration, asking that the Administrative Judge reconsider the conclusions reached in her case. *See* 4 C.F.R. §28.87(b)(2). That request was denied by Memorandum and Order dated June 14, 2002 (Reconsideration Order), and this appeal followed. Petitioner's Response to the April 25, 2002 Decision to the Personnel Appeals Board (Pet.Brief) was filed on October 31, 2002. The Agency's Responsive Brief to the Full Board was filed on November 25, 2002. (Resp.Brief).

Pursuant to 4 C.F.R. §28.87(g), we have thoroughly reviewed the record in this case and considered the arguments of the parties in light of applicable law. Accordingly, for the reasons set forth below, the Board reverses the conclusion of the Initial Decision and holds that the Agency action in this matter cannot be sustained.

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$100,000 repayment for debts incurred resulting from her inability to obtain an accommodation and the additional medical expenses stemming from the process of trying to obtain an accommodation to continue employment; attorney's fees; and placement on full retirement or a sum equivalent to the salary she would have earned between the date her employment ended and her earliest retirement eligibility date (Nov. 25, 2004). PfR ¶5. Appellant's employment with GAO actually ended on September 19, 1997 rather than 1998.

[2] To the extent that Appellant challenges the conclusions of the AJ on the dispositive motion, we affirm the decision to dismiss the claims as to lack of standards and guidance for seeking an accommodation and as to the investigations conducted by the Civil Rights Office (CRO) and the Personnel Appeals Board Office of General Counsel (PAB/OGC). While the issue concerning lack of guidance was deemed not to constitute a separate cognizable claim, related evidence was permitted at the hearing insofar as it might bear on other issues in the case. *See* Reconsideration Order at 1; Initial Decision at 3; Order of July 11, 2000 at 4-5. Moreover, the claim concerning earlier investigations was dismissed because the Board provides an independent review, not based on the prior conclusion of either investigative unit. Reconsideration Order at 1-2; Initial Decision at 3; Order of July 11, 2000 at 3-4. Appellant nevertheless had the opportunity to present evidence to the Board of matters that had been raised with the CRO and the PAB/OGC. Appellant now states that she never sought a review of the investigations, but rather, to use the report of investigation for evidentiary purposes before the PAB. Pet.Brief at 2. This argument was not raised before the Initial Decision was issued. Finally, the AJ correctly rejected the Agency's effort to have the claims arising before April 7, 1996 dismissed, on the basis that they were reasonably related to Appellant's allegation concerning the failure to accommodate. *See* Order of July 11, 2000 at 2-3.

B. Factual Background

The facts underlying Appellant's case are set out in careful detail in the Initial Decision and the Board adopts the AJ's rendition of the facts for purposes of the appeal. *See* Initial Decision at 4-36. Those facts deemed critical to our conclusion herein are summarized below.

Appellant began employment with GAO on April 1, 1974, becoming an evaluator in October 1980. Joint Stipulation of Facts (JS) ¶1; Respondent's Exhibit (R.Ex.) 48 ¶1. During most of her employment with GAO, Appellant was under treatment for clinical depression. Transcript (TR) 497-512, 520-30. From the late 1980s to late 1995, Appellant's performance appraisals showed that she was meeting and/or exceeding expectations as to her duties but that some concern (including a warning) about absences had surfaced. *See* Initial Decision at 11-14 & n.6. Appellant told her first-line supervisor during this period, Lawrence Kiser, that she was under treatment for depression. TR 47. She also referenced her clinical depression in comments on a 1991 performance appraisal reviewed by Mark Gebicke, an Issue Area Director in her Division. *See* Petitioner's Exhibit (P.Ex.) 37 at 3. Her second-line supervisor for much of this period, Frank Degnan, following advice from the Personnel Office not to add additional stress to Appellant's situation, tried to give her assignments without tight deadlines to circumvent her frequent absences. TR 75. He also allowed Appellant to "borrow" leave from the next pay period to avoid leave without pay situations. TR 76-80.

Appellant's annual appraisal for fiscal year 1995, which included an "outstanding" in the dimension of data gathering and documentation as well as "exceeds fully successful" in the other five dimensions on which she was rated, evidenced that she was a solid performer at that time: "Despite a high absentee rate, she clearly demonstrated that she is a very capable evaluator who possesses the knowledge, breadth of skills, and critical instincts necessary to perform well beyond the fully successful level." P.Ex. 46 at 2.

In late 1995, Thomas V. Schulz assumed supervisory responsibility for Appellant's group. TR 107, 118-19. Shortly after his arrival, he questioned Messrs. Degnan and Kiser about a delayed work product, and learned that the product's completion had been hampered by Appellant's absences. TR 132-33, 238. He cautioned the intermediate supervisors about Appellant's improper use of "flexitime," and the need to remind her of the importance of completing the work. TR 133-34. Mr. Schulz asked Mr. Kiser to take supervisory notes on Appellant's attendance, in case disciplinary action should be taken. TR 31.

Messrs. Schulz, Kiser and Degnan met with Appellant on March 28, 1996 to set parameters for more timely completion of assignments and improved attendance. TR 33, 134-35; R.Ex. 1. Until that time, Appellant had been allowed to use leave on an unpredictable basis and report to work when she could. TR 133-34. Following the meeting, Appellant was required to work a set, 8-hour day, 40-hour week within the Agency's core hours.[3] She also was required to e-mail Mr. Schulz daily to confirm her arrival time. TR 34; R.Ex.1 ¶¶1, 2. Appellant was warned that leave

[3] GAO's "core hours" at the relevant time consisted of a starting time from 6:00 a.m. to 9:15 a.m. and an ending time up to 6:00 p.m., Monday through Friday. Order 2620.1 (Jul. 31, 1989), ch.3 ¶2.c; TR 189.

restrictions might be imposed if her attendance continued to be unreliable. R.Ex. 1 ¶6; JS ¶7. Appellant's eligibility for disability retirement was also discussed at the meeting. R.Ex. 1 ¶4.

Appellant continued to arrive late for work and take unapproved absences after the meeting, and was placed on leave restrictions two weeks later in April 1996. The restrictions included, among other rules, a requirement to report any unscheduled absence directly to Mr. Schulz or Mr. Degnan by 9:00 a.m. on the day in question. R.Ex. 51. Within two weeks of being placed on leave restrictions, the Agency proposed Appellant's suspension for three days because of continued unscheduled, unexcused absences, as outlined in the Initial Decision (at 17-18). S*ee* R.Ex. 13. The absences stemmed from her oversleeping, and Mr. Schulz was aware that she believed her medical problems were affecting her attendance. Initial Decision at 18-19; TR 143. Appellant's reply to the proposal noted that the "9:00 a.m. call-in time dooms me to be in perpetual violation of the leave restriction policy by the nature of the disorder itself." R.Ex. 14 at 1. Appellant was given five days in which to supply detailed information from her medical provider.[4] R.Ex. 15. She did not provide the requested information within the timeframe specified, and the suspension followed. R.Ex. 16.

Janet Wilson, a GAO staff psychologist, received information from Appellant's psychiatrist at the end of May 1996, including a diagnosis of major depression but omitting any recommendation as to modification of the work environment. R.Ex. 20. In the ensuing weeks, as the record reflects, various Management personnel referenced the possibility of an underlying medical condition as the basis for Appellant's attendance difficulties. *See* Initial Decision at 20-22; P.Ex. 17. Appellant's sporadic absences and late arrivals continued, and she received a second suspension proposal on June 21, 1996. R.Ex. 22. As with the first suspension, the Agency's documentation reflected the perspective that discipline was the appropriate course under the circumstances. *Id.; see* Initial Decision at 17-23.

Appellant responded to the proposed suspension by asking for additional time to secure medical documentation for her absences. *See* R.Ex. 17 at 1. On July 8, 1996, she provided the report from a sleep study that documented "a total absence of stage V rapid eye movement sleep," suggested a possible correlation with the effect of medication or patient tension, and recommended clinical follow-up "to better understand the importance of these findings." R.Ex. 46.

The Issue Area Director for Appellant's work group, Lou Rodrigues, thereafter advised her of the need to provide medical documentation establishing that she had a "medical condition which needs to be taken into account," that "the condition is causing or exacerbating the leave problem/performance problem," and that it should "articulate the accommodation(s) for the condition needed while at work." R.Ex. 23 at 1. She was given six days in which to produce the

[4] She was to supply the history of the specific medical condition; a summary of clinical findings from her most recent medical evaluations including information on physical examinations, laboratory tests, and any specialized evaluations; an assessment of current clinical status and plans for future treatment; a diagnosis/prognosis; an estimated date of full or partial recovery; an explanation of the impact of the medical condition on her position; an explanation of the medical basis for any conclusion that the condition had or had not become static or well established; and a statement certifying that she was unable to work or to report to work in a timely manner on the days in question for the suspension. R.Ex. 15.

following documentation from her physician: the history of her medical conditions (including findings from previous examinations, treatment and responses); the most recent clinical findings; diagnosis (including current clinical status); prognosis (including plans for future treatment and estimate of expected date of full or partial recovery); an explanation of the condition's impact on overall health and activities (including basis for restrictions or accommodations and, if warranted, an explanation of their therapeutic or risk avoiding value); an explanation of the effect of carrying out her duties—as to the possibility of resulting sudden or subtle incapacitation; and a narrative explanation of the medical basis for concluding that the condition had or had not been stabilized and that the individual may experience sudden or subtle incapacitation as a result of the condition. *Id.; see* Initial Decision at 24 n.13.

Within the specified timeframe, Dr. Edward Dworkin, a clinical psychologist familiar with Appellant, informed GAO that while he needed more precise medical information, Appellant:

> continues to report chronic debilitating problems with sleep and chronic overwhelming fatigue which prevents her from waking in the morning and from arriving . . . on time if at all, and that even when she is present at work it is very difficult for her to perform her job.

R.Ex.18 at 2. Dr. Dworkin stated that he could not give a prognosis pending the results of consulting evaluations. *Id.* Within the same week, Michele Hamilton, the human resources manager for Appellant's Division, advised Mr. Schulz that the medical reports "suggest that there is justification to the behavior. This problem could be enhanced if medications and/or other chemical [sic] are taken in any form." P.Ex. 16; *see* TR 258.

Near the end of July 1996, Mr. Rodrigues received from Appellant's internist, Dr. Jonathan Forman, an assessment of Appellant's medical condition, with a diagnosis of chronic fatigue, depression, and sleep disturbance. Dr. Forman foresaw no change in the near term, offered no suggestions for accommodation, listed her prognosis as "guarded" and suggested weaning Appellant from antidepressants on a trial basis. R.Ex. 24.

The Agency decided to suspend Appellant for 14 days, stating that although she had been given "the opportunity to submit medical evidence," she had "not provided evidence to Mr. Schulz to support . . . [her] claims," and that even if she were to do so, "reliable attendance is a critical function" of the evaluator position. R.Ex. 19 at 6.

In September 1996, Appellant received her annual appraisal—this time including two ratings of "unacceptable," one "needs improvement," two "fully successfuls," and one "exceeds fully successful." Attendance issues were raised repeatedly on the appraisal. P.Ex. 48.

During a three-week period in October 1996, the Agency received three separate communications from medical professionals regarding Appellant's condition and prognosis; two of these referred to possible accommodations. On October 11, 1996, Appellant's psychiatrist, Dr. Merrill Berman, wrote to Mr. Schulz concerning Appellant, stating that her prognosis was excellent and that if appropriate antidepressant treatment could be determined, psychotherapy and a good alarm clock were likely to result in full recovery. The diagnosis was described as

"depression with insomnia and the neurological findings of absence of REM sleep" which "impact globally on her general emotional status as well as her central nervous system." R.Ex. 42 at 2. The Agency notified Appellant that this letter was insufficient because it specified neither the accommodation needed and the basis for it nor the expected date of recovery. R.Ex. 80. Dr. Berman wrote a follow-up letter on October 25, 1996 that projected full recovery within a year, absent unforeseen setbacks, and recommended that Appellant could more appropriately suggest an effective accommodation but that "adjusting . . . work hours to permit her to arrive at work later than presently scheduled and to work past her current departure time should improve her attendance." R.Ex. 43.

Dr. Edward Dworkin, Appellant's psychologist, wrote to Mr. Schulz on October 30, 1996 to provide requested medical documentation. He described that Appellant:

> continues to suffer from depression and insomnia. Her insomnia is most likely directly related to neurological findings of absence of REM sleep. Lack of sleep impacts dramatically on her ability to awaken in the morning and contributes to her symptoms of depression, her ability to arrive at work on time, to concentrate on her work once she has arrived . . . and to be as productive as . . . in the past.

R.Ex. 44 at 2. As to prognosis, Dr. Dworkin projected that after Appellant "has an appropriate antidepressant medication regimen and her REM sleep patterns return to minimally effective levels," complete recovery would be likely. *Id.* at 2.

As to accommodations for Appellant, Dr. Dworkin specifically recommended that "it would be medically appropriate for her to be given a flexible schedule." R.Ex. 44 at 2. His letter listed as examples flexiplace, flexitime, and removal from leave restrictions "since the nature of her illness is unpredictable on a day-to-day basis," and stated his belief that Appellant "might be able to perform her work within the above mentioned parameters even before she is medically healed." *Id.* Without accommodations, Dr. Dworkin believed that Appellant's medical condition would preclude her from timely attendance and normal productivity, and that dramatic improvement in those areas would result within six months if leave restrictions were removed and accommodations made. *Id.* at 2-3.

As the AJ concluded, by the end of October 1996, Appellant's doctors had established that Appellant's disability—depression—could be addressed through adjustment of medication over time, and had connected some of the attendance difficulties, particularly late arrival, to her disability. *See* Initial Decision at 28. Both medical providers suggested flexibility of schedule to address the problem, and one specifically suggested limited use of flexiplace. Both also told GAO that allowing time for medication adjustment during a period of accommodation would likely turn the situation around.

During 1996, after Management rejected her efforts to secure an accommodation to address the attendance issue, Appellant filed a charge with the Agency's Civil Rights Office. TR 540-42. Through this process she learned that lower level managers only had authority to grant requests for reasonable accommodation; denials of such requests were subject to review by John Luke,

then Deputy Comptroller General for Human Resources. TR 490, 540-41; *see* R.Ex. 4. Appellant therefore wrote to Mr. Luke in January 1997 to appeal the denial of her accommodation request. P.Ex. 59. She informed Mr. Luke that she suffered from "major depression with insomnia," and other related conditions, and referred him to the documentation previously submitted by her doctors. She specifically asked to be allowed to work at home on Tuesdays and Thursdays, on a trial basis. P.Ex. 59 at 1; TR 525, 578-79.

Mr. Luke denied the request for limited use of flexiplace, on the basis that it is intended to be "episodic in nature with measurable work results," and that her attendance record and most recent appraisal rendered such an arrangement inappropriate. R.Ex. 8 at 1. As the AJ noted, the record in this matter provides ample support that the use of flexiplace was more open-ended than Mr. Luke described. Initial Decision at 30. Mr. Luke did lift Appellant's leave restrictions and allowed her to vary her work schedule from day to day within the Agency's core hours. R.Ex. 8 at 1; TR 189. She also was instructed to continue to notify her supervisor upon arrival and departure each day. She was given two hours in which to report absence due to illness, and encouraged to report for duty when possible, even if late. R.Ex. 8 at 1. Appellant was required to seek advanced approval for sick leave for medical appointments, annual leave, and leave without pay. *Id.* at 2. Mr. Luke stated that the variable schedule would be in effect for 60 days "in an attempt to help accommodate your medical condition," with the hope that she would improve toward a more regular schedule. *Id.* at 2.

By May 1997, Appellant's performance had plummeted to include four ratings at the "unacceptable" level. P.Ex. 51. Mr. Luke approved continuation of Appellant's work hour procedures that had been established in February 1997, "in light of her medical condition and performance status." R.Ex.12 (emphasis added).

On July 25, 1997, GAO proposed to remove Appellant from employment on the basis of her being absent without leave (AWOL) on 67 occasions from September 1996 to April 1997, and her failure to follow leave restrictions. Most of the infractions cited took place prior to Appellant's appeal to Mr. Luke. *See* R.Ex. 25 at 3-9, 11-16; Initial Decision at 33. In her oral reply to the proposed removal, Appellant referenced her "sleep problem" and inquired about the availability of a support position or part-time work at that juncture. R.Ex. 26 at 1; TR 417-18. Both requests were denied. R.Ex. 47 at 1; TR 437-38. Finally, Appellant asked for a delay in her removal pending the Office of Personnel Management (OPM) disposition of her application for disability retirement, filed on August 15, 1997. R.Ex. 26; TR 418.

GAO notified Appellant on September 11, 1997 of the decision to remove her effective September 19, 1997, stating that it was neither in the Agency's nor the Appellant's "best interest" to delay the removal decision. R.Ex. 47 at 1, 6. The letter stated that the options of part-time or support position employment were denied because "[r]egular and reliable attendance is an essential element of" all positions in the Division. *Id.* at 1. The removal letter described the "accommodations" provided in February 1997, and concluded that there was "little evidence that you profited from previous managerial sanctions or that anything short of removal would end your continuing problems." *Id.* at 3, 6.

Appellant resigned on the effective date of her removal. Thereafter, she did obtain disability retirement through OPM, retroactive to her separation on September 19, 1997.[5] TR 571-72.

## II. Analysis

### A. Introduction

The PAB's regulations provide that, on appeal, the full Board may review the record *de novo*. 4 C.F.R. §28.87(g). Ordinarily, the Board will not overturn a finding of fact in the initial decision "unless that finding is unsupported by substantial evidence in the record viewed as a whole." *Id.* The Board will also consider whether: new and material evidence is available; or the initial decision is based on erroneous interpretation of statute or regulations; or the initial decision is arbitrary, capricious or an abuse of discretion or otherwise not consistent with law; or the initial decision is not made consistent with required procedures and results in harmful error. *Id.*

The AJ found that Appellant's disability of depression manifested itself in her inability to arrive on time for work and, at times, inability to report for duty at all. He found that although her depression had been known in the workplace for a period of years, the impaired ability to arrive for work on time increased following the March 1996 meeting as she was unable to meet the requirements of the new schedule. Initial Decision at 39-40.

Appellant asserts that a component of her depression is an inability to awake at times that causes her to oversleep. She contends that with reasonable accommodation she could have satisfactorily performed the duties of her position. *See* Pet. Post-Hearing Brief at 6-8; Petitioner's Post-Hearing Reply Brief (Pet.Rep.Br.) at 13-16; TR 542-43. In this regard she requested as accommodation that she be permitted flexibility in starting and quitting times. *See* R.Exs. 14, 43, 44; PfR at ¶¶3, 4. The flexibility would have permitted her to come in when she was able and stay until she completed all necessary tasks for the day—an accommodation that would be similar to the conditions made available to her before March 1996. She also asked that she be permitted to work at home two days per week for a trial period. P.Ex. 59 at 1. Following notice

[5] Neither Appellant's application for disability benefits nor OPM's grant of benefits constitutes a bar to her ADA claim of discrimination. EEOC has issued *Enforcement Guidance on the Effect of Representations Made in Applications for Disability Benefits on the Determination of Whether a Person Is a "Qualified Individual With a Disability" Under the ADA*, No. 915.002 (Feb. 12, 1997), which is found in the EEOC *Compliance Manual*, Vol. II, following Section 902 - Definition of the Term "Disability" (Jul. 30, 1997). The *Guidance* states that "[s]everal important elements distinguish the definition of the term 'qualified individual with a disability' under the ADA from the definitions of 'disability' under other statutory schemes and contracts." Thus, "an individual may be 'unable to work' for the purposes of a disability benefits program and yet still be able to perform the essential functions of a particular position with or without reasonable accommodation." *Id*. Part I, C (citations omitted).

Additionally, the *Guidance* provides a public policy argument against making representations in connection with an application for benefits an absolute bar to an ADA claim. "Barring an individual who applies for disability benefits from bringing a claim under the ADA would 'place [him/her] in the untenable position of choosing between his right to seek disability benefits and his right to seek redress for an alleged violation of the ADA'." *Id*. Part III, B (citing *Smith v. Dovenmuehle Mortgage, Inc.*, 859 F.Supp. 1138, 1142 (N.D. Ill. 1994)).

by the Agency of its intent to remove her, Appellant requested that she be either reassigned to a support position or given part-time work. R.Ex. 26 at 1; TR 417-18.

GAO contends that regular and reliable attendance is an essential function of Appellant's job. Resp.Brief at 14. The Agency argues that its policy requires that work be performed within core hours of 6:00 a.m. and 6:00 p.m. It also argues that Appellant does not meet the criteria for flexiplace (work at home): that persons entitled to flexiplace must have demonstrated dependability and reliability, which Appellant did not have by virtue of her attendance problems. *Id.* at 17. In addition, the Agency contends that flexiplace would not be in the best interest of the Appellant because of possible adverse affects that could result from the lack of human interaction. *Id.* at 17-19.

On the basis of what he accepted as expert testimony, the AJ found that work at home was not an appropriate course for a person suffering from depression, that it was "medically 'contraindicated'." Initial Decision at 49. In addition, he found that the Agency, through Mr. Luke, had provided a reasonable accommodation by permitting a variable flexibility of starting and quitting times within the core hours and by lifting the leave restrictions. *Id.* As these measures were not effective, and Appellant lacked dependability and reliability, the AJ found that the Agency was not obligated to reassign the Appellant. He concluded that GAO had properly reasoned that reassignment would not obviate Appellant's difficulty with attendance and thus, would not be an effective accommodation. *Id.* at 50. Because Appellant had previously declined part-time employment, the AJ held that GAO was not obligated after several months of continued attendance difficulties to make that option available again. *Id.* at 54-55.

Our review of the record and applicable law in this case leads us to conclude that the Initial Decision must be reversed. The Administrative Judge concluded—and we agree—that the Appellant was an individual with a disability within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq*. The Agency's insistence that Appellant comply with the core hours policy and its concomitant resistance toward her requests for flexibility because it believed, despite medical and other evidence, that she could conform her behavior to its policies, constituted a failure to accommodate her disability. As set forth more fully below, we conclude as a matter of law that GAO's unwillingness to deviate from the core hours policy in this case violated the Americans with Disabilities Act, 42 U.S.C. §12112(b)(5).

In order to establish a *prima facie* case of failure to accommodate under Title I of the ADA, an employee must show: (1) that the employer is subject to the statute; (2) that he or she is an individual with a disability within the meaning of the ADA; (3) that with reasonable accommodation he or she could perform the essential functions of the job; and (4) that the employer had notice of the employee's disability and failed to provide the accommodation. 42 U.S.C. §12112(b)(5); *Lyons v. Legal Aid Soc'y*, 68 F.3d 1512, 1515 (2d Cir. 1995); *see Toyota Motor Mfg. v. Williams,* 534 U.S. 184, 193 (2002); *Kralik v. Durbin*, 130 F.3d 76, 78 (3d Cir. 1997). This decision centers on the third and fourth factors.

As the AJ described in his Decision, the Courts of Appeals have been divided over the question concerning the degree of burden on an employee and the point at which the burden shifts to the employer.[6] Initial Decision at 52. The Supreme Court referenced the issue recently in *U.S. Airways v. Barnett*, 535 U.S. 391, 401-02 (2002). In *Barnett*, the Court stated:

> Many of the lower courts, . . . have reconciled the phrases "reasonable accommodation" and "undue hardship" in a practical way.
>
> They have held that a plaintiff/employee (to defeat a defendant/employer's motion for summary judgment) need only show that an "accommodation" seems reasonable on its face, *i.e.*, ordinarily or in the run of cases. See, *e.g, Reed v. LePage Bakeries, Inc.,* 244 F.3d 254, 259 (CA1 2001) (plaintiff meets burden on reasonableness by showing that, "at least on the face of things," the accommodation will be feasible for the employer); *Borkowski v. Valley Central School Dist.,* 63 F.3d 131, 138 (CA2 1995) (plaintiff satisfies "burden of production" by showing "plausible accommodation"); *Barth v. Gelb,* 2 F.3d 1180, 1187 (CADC 1993) (interpreting parallel language in Rehabilitation Act, stating that plaintiff need only show he seeks a "*method of accommodation* that is reasonable in the run of cases") (emphasis in original).

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[6] The Ninth Circuit places on the employee only the burden of coming forward to rebut the employer's showing that no reasonable accommodation is available. *See Mantolete v. Bolger*, 767 F.2d 1416, 1423-24 (9th Cir. 1985). The Fifth, Sixth and Eighth Circuits have adopted similar approaches. *See Riel v. EDS Corp.*, 99 F.3d 678, 682 (5th Cir. 1996) ("[u]ltimately, the employer bears the burden of proof for both 'undue burden' and 'business necessity' because both are affirmative defenses under the language of the statute"); *Cehrs v. Northeast Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 781 (6th Cir. 1998) (if an employee "establishes that a reasonable accommodation is possible, then the employer bears the burden of proving that the accommodation is unreasonable and imposes an 'undue hardship' on the employer"); *Benson v. Northwest Airlines*, 62 F.3d 1108, 1112 (8th Cir. 1995) (once an employee "makes a 'facial showing that reasonable accommodation is possible,' the burden of production then shifts to the employer" to prove inability to accommodate).

The D.C. and Seventh Circuits adopt a more demanding approach. Those Courts place the burden on the employee to show the accommodation is effective, that is, that the accommodation allows him or her to perform the essential functions of the job, and that it does not place an unreasonable burden on the employer. *See Barth v. Gelb*, 2 F.3d 1180, 1186-87 (D.C. Cir. 1993), *cert. denied,* 511 U.S. 1030 (1994); *Carr v. Reno*, 23 F.3d 525, 529 (D.C. Cir. 1994); *Vande Zande v. Wisconsin Dept. of Admin.,* 44 F.3d 538, 543 (7th Cir. 1995).

As the AJ stated, the Second Circuit has adopted a middle ground between the lighter burden imposed on the employee by the Fifth, Sixth, Eighth and Ninth Circuits and the more demanding approach of the D.C. and Seventh Circuits. In order to satisfy his or her burden of production the employee need only "suggest" an accommodation. The burden of proving that it is not reasonable is on the employer. *Borkowski v Valley Cent. Sch. Dist.*, 63 F.3d 131, 137-38 (2d Cir. 1995). According to the Second Circuit, "[i]t is enough for the plaintiff to suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits." *Id*. at 138.

> Once the plaintiff has made this showing, the defendant/employer then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances. See *Reed, supra* at 258-59 ("undue hardship inquiry focuses on the hardships imposed . . . in the context of the particular [employer's] operations" . . .; *Borkowski, supra,* at 138 (after plaintiff makes initial showing, burden falls on employer to show that particular accommodation "would cause it to suffer an undue hardship"); *Barth, supra* at 1187 ("undue hardship inquiry focuses on the hardships imposed . . . in the context of the particular agency's operations").
>
> Not every court has used the same language, but their results are functionally similar. . . .

535 U.S. at 401-02.

Thus, the employee must show that an accommodation that plausibly would remove the workplace barrier is available. Once shown, the burden is on the employer to show that such an accommodation imposes undue hardship.

B. The Appellant Has Established that Plausible Reasonable Accommodations were Available.

The Equal Employment Opportunity Commission (EEOC) has issued regulations and interpretive guidance regarding the employment provisions of the ADA, and courts have noted that such regulations and guidance are entitled to considerable deference. *See, e.g., Gile v. United Airlines,* 95 F.3d 492, 497 (7th Cir. 1996). The EEOC's *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, No. 915.002 (Oct. 17, 2002) provides that "[a]n employer must provide a modified or part-time schedule when required as a reasonable accommodation, absent undue hardship, even if it does not provide such schedules for other employees." *Enforcement Guidance*, Quest. 22.[7] Workplace policies must be modified when necessitated by an individual's disability-related limitations, absent undue hardship. 42 U.S.C. §12111(9)(B); 29 C.F.R. §1630.2(o)(2)(ii). An employer must also modify its policy, absent undue hardship, as to where work is performed, if such a change is needed as a reasonable accommodation. *See* 29 C.F.R. §1630.2(o)(1)(ii) (2001); *Enforcement Guidance,* Quest. 34.

Appellant requested a combination of modified work schedule and flexiplace. The record shows that during the period when the Agency did not enforce narrowly time and attendance rules, Appellant was allowed to bend Agency rules through an informal accommodation—by arriving late and working late—and her work was accomplished. In rejecting that accommodation, the AJ noted that even during the informal accommodation, Appellant's time and attendance had

[7] For a detailed discussion of the reasonable accommodation process see 29 C.F.R. Pt. 1630 App. §1630.9.

been a concern.[8] Initial Decision at 54. However, although Appellant's erratic schedule may have been a concern, it apparently did not prevent Appellant from performing the essential functions of her position. In her performance appraisal for the rating period ending September 15, 1995, which was the last annual performance appraisal received before the informal accommodation was withdrawn, Appellant received ratings of "exceeds fully successful" in five of her job dimensions and "outstanding" in the remaining dimension. In that appraisal her supervisor stated in pertinent part, "[d]espite a high absentee rate, she clearly demonstrated that she is a very capable evaluator who possesses the knowledge, breadth of skills, and critical instincts necessary to perform well beyond the fully successful level." P.Ex. 46 at 2. In virtually all other performance appraisals dating back to 1992, Appellant received ratings of "fully successful" or better. P.Exs. 39, 41, 42, 44. Where her attendance problems were mentioned, her raters explicitly noted that they did not adversely affect meeting reporting deadlines. P.Ex. 42.

Appellant also asked for the opportunity to work at home two days per week for six weeks on a trial basis. She testified as follows:

> I think the tension would have been considerably eased on the days that I was home. . . . I don't even know that it would have worked. My suggestion all along was, "Let me try it on a trial basis." I suggested six weeks. At the end of that six weeks, if I wasn't happy with it or if GAO wasn't happy with it, then I was faced with another problem—what would work. But it seemed to me that, from talking to people that were on Flexi-place, they said, "You don't have to get up. You don't have that awful commute. When you can hop out of bed and in your slippers, go right and start to work, you get more done. It is quieter.

TR 525-26.[9]

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[8] The EEOC has held that attendance cannot be considered an essential element of an employee's position because of the large number of employees with disabilities who would be eliminated from the law's coverage by such a definition. *Purvis v. U.S. Postal Service*, App. No. 01921624 (1992), 1992 WL 1371173 (EEOC), reopening denied, 1993 WL 1509667 (EEOC). In that case, the Commission held that the agency in question had failed to show "'that accommodation of appellant, in the form of leave, job restructuring, or reassignment, would cause the agency undue hardship; . . . In addition, the agency failed to offer any evidence that it suffered the loss of an essential function as a result of appellant's absences'." *Id. See also* Hadley, *A Guide to Federal Sector EEO Law and Practice,* at 1166-67 (Dewey 15th ed. 2002).

[9] Although Appellant expressed some uncertainty about the effectiveness of the flexiplace accommodation, the ADA does not require an employee to show that a suggested accommodation is certain or even likely to be successful to prove that it is reasonable. *Humphrey v. Memorial Hospitals Ass'n*, 239 F.3d 1128, 1136 (9th Cir. 2001), *cert. denied*, 535 U.S. 1011 (2002) (citing *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869 (9th Cir.), *cert. denied*, 498 U.S. 814 (1990)).

The Board finds that Appellant has shown that plausible reasonable accommodations such as a modified schedule allowing her to report for work later than permitted under the "core hours" policy or flexiplace or a combination of the two were available, absent undue hardships.[10]

C. The Agency Has Failed to Show that the Requested Accommodations Imposed an Undue Hardship.

The ADA provides that an employer must make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the business. 42 U.S.C. §12112(b)(5)(A).

Undue hardship is defined under the Act as "an action requiring significant difficulty or expense." 42 U.S.C. §12111(10)(A). Undue hardship requires the employer to demonstrate significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of the accommodation. Generalized conclusions will not suffice to support a claim of undue hardship. *Enforcement Guidance, supra*, at 30-31. Typically, the employer must show case-specific circumstances "that demonstrate undue hardship in the particular circumstances." *Barnett, supra,* 535 U.S. at 402.

The Agency argues and the AJ found that providing Appellant any of the suggested accommodations would have been futile in view of her poor attendance record, even after Mr. Luke lifted the leave restrictions and permitted her to come in at any time as long as she performed her duties within the core hours. In our view this argument turns the requirement for reasonable accommodation on its head.

The record shows that while on the informal accommodation, Appellant's performance met or exceeded expectations. After March 28, 1996, when her supervisors required her to comply with the policy of working only during the core hours on a fixed schedule and further, placed her on leave restrictions, her attendance problems increased significantly, and concomitantly, her performance deteriorated. Thus, the manifestations of her impairment often prevented her from arriving at work within the designated starting times. These failures, in turn, constituted the poor attendance record that is now cited as making Appellant ineligible for the accommodations she requested.

The Agency also cites to its policies that work must be performed during the core hours and that flexiplace may not be provided to someone who is in a performance improvement opportunity period or has not demonstrated dependability. *See, e.g.,* TR 454-61; R.Ex. 8 at 1. But, as stated above, an employer must adjust policies if necessary to meet its duty to provide reasonable accommodation—even if those adjustments are not available to other employees. *See Barnett, supra,* 535 U.S. at 398 ("[t]he simple fact that an accommodation would provide a

[10] Although Appellant requested a combination of the flexible work schedule and flexiplace, the Agency was not required to provide both accommodations. If more than one accommodation is effective, "the preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations." 29 C.F.R. Pt 1630 App §1630.9.

'preference'—in the sense that it would permit the worker with a disability to violate a rule that others must obey—cannot, *in and of itself*, automatically show that the accommodation is not 'reasonable'"). We agree with the AJ that the "Agency's position places too much reliance on internal rules, without reference to the requirement to bend and adjust rules where appropriate in the interest of reasonable accommodation." Initial Decision at 48-49.

The Agency also argues that Appellant's position requires regular and reliable attendance and that it is an essential element of her position. We agree with the AJ's rejection of the Agency's argument that regular attendance is, *per se*, an essential function of the evaluator position. We adopt his approach that holds that in the context of reasonable accommodation, whether a certain form of attendance is essential requires an individualized determination. Initial Decision at 42-43. We also agree that there is ample evidence in the record that evaluators were frequently granted use of flexiplace for periods of various durations and that, therefore, "strict interpretation of 'core hour' attendance for evaluators does not comport with actual practice at GAO."[11] Initial Decision at 44. The Agency has failed to show that providing the suggested accommodations to Appellant would have resulted in undue hardship to GAO.

The most critical determination by the AJ concerned the issue as to whether the accommodation of flexiplace would not work or be good for Appellant, including the determination that it was actually medically contraindicated. Initial Decision at 49. The ADA allows employers to establish qualification standards that may include a requirement that an individual shall not pose a direct threat to the health and safety of other individuals in the workplace. 42 U.S.C. §12113(b). EEOC further defines this section at 29 C.F.R. §1630.2(r):

> *Direct Threat* means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:
>
> (1) The duration of the risk;
> (2) The nature and severity of the potential harm;
> (3) The likelihood that the potential harm will occur; and
> (4) The imminence of the potential harm.

[11] We cannot help but note that GAO was upheld by the Court of Appeals for the Tenth Circuit as having met the Rehabilitation Act's requirement that executive agencies act as model employers, when it accommodated an evaluator by letting him work at home on a task-by-task basis up to 80 percent of the time. *Moore v. Walker*, 24 Fed. Appx. 924, 2001 U.S. App. LEXIS 26402 at 11 (10th Cir. 2001) (unpublished).

EEOC has held that in order to exclude an individual on the basis of possible future injury, the Agency must show there is a significant risk, *i.e.,* high probability of substantial harm; a speculative or remote risk is insufficient. *Selix v. U.S. Postal Service*, App. No. 01970153, 2000 EEOPUB LEXIS 1489 (2000). The Commission stated that:

> A determination of significant risk cannot be based merely on an employer's subjective evaluation, or, except in cases of a most apparent nature, merely on medical reports. Rather, this requires that the employer gather and base its decision on substantial information regarding the individual's work and medical histories.

*Id*. at 14.

"The assessment that there exists a high probability of substantial harm to the individual, like the assessment that there exists a high probability of substantial harm to others, must be strictly based on valid medical analyses and/or on other objective evidence." 29 C.F.R. Pt. 1630 App. §1630.2(r). Thus, a person with a mental illness cannot be excluded from employment on a general medical opinion that the stress inherent in the job might exacerbate the disability. *Id*.

The AJ relied on the testimony of two witnesses on this issue. Dr. Janet Wilson, the Agency's clinical psychologist, testified that "[t]he general rule of thumb is that people [who suffer from depression] who are able to get out the door are better off if they try to be engaged and at work, rather than staying away from work." TR 391-92. Dr. Neal Presant, a specialist in Occupational Medicine who apparently never met with Appellant, based his testimony on Appellant's direct testimony and a review of medical records submitted as Respondent's Exhibit 85. TR 617-18. He testified that permitting Appellant to work at home would be "very problematic." TR 622. Dr. Presant opined that because of Appellant's difficulties in concentration, sleep problems, and history of alcohol abuse, he did not think that working at home would be a suitable accommodation. TR 622. By contrast, Appellant's own psychologist, Dr. Dworkin, specifically suggested flexiplace as "medically appropriate" in his October 1996 report. R.Ex. 44 at 2.

The Board finds that the evidence, which for the most part constitutes medical opinion about what is considered best, in general, for persons with depression, does not meet the requirement of providing an individualized assessment that shows "a high probability of substantial harm." *See* 29 C.F.R. Pt. 1630 App. 1630.2(r).

D. The Agency Did Not Engage in a Good Faith Effort to Provide a Reasonable Accommodation.

The AJ accurately described the responsibilities of an employer after Appellant's medical providers had submitted sufficient information to alert the Agency to the need to identify and provide reasonable accommodation, noting that under EEOC's *Guidance*, GAO was obligated to make reasonable efforts toward that goal. Initial Decision at 50-52.[12]

[12] As the EEOC has concluded, the Supreme Court's decision in *Barnett* does not affect the interactive process that flows from an individual's request for an accommodation. *Enforcement Guidance* at 34.

Several of the Circuits have now held that the interactive process described in EEOC regulations and guidelines is a mandatory rather than permissive obligation of an employer under the ADA, and that this obligation is triggered by an employee or an employee's representative giving notice of the employee's disability and the desire for a reasonable accommodation. *See* 29 C.F.R. §1630.2(o)(3); 29 C.F.R. Pt. 1630 App. §§1630.2(o), 1630.9. *See also Humphrey v. Memorial Hospitals Ass'n*, 239 F.3d 1128, 1137 (9th Cir. 2001), *cert. denied,* 535 U.S. 1011 (2002); *Barnett v. U.S. Air,* 228 F.3d 1105, 1111-14 (9th Cir. 2000), *rev'd on other grounds*, 535 U.S. 391 (2002); *Haschmann v. Time Warner Entm't Co.*, 151 F.3d 591, 601 (7th Cir. 1998); *Bultemeyer v. Fort Wayne Cmty. Sch.*, 100 F.3d 1281, 1285-86 (7th Cir. 1996); *Enforcement Guidance*, Quest 5.

The requirement to engage in the interactive process is a continuing one. Thus, if an attempted accommodation is unsuccessful, the employer's obligation to engage in the interactive process continues beyond the first attempt. The interactive process is required when the employer realizes the need for further accommodation. *Humphrey*, 239 F.3d at 1138.[13]

As the *Guidance* indicates, the nature of the dialogue will vary. It is, however, an opportunity for employer and employee to work together to identify an effective accommodation. The interactive process requires communication and good faith exploration of possible accommodations between the employer and individual employee. Neither side can delay or obstruct the process. *Humphrey*, 239 F.3d at 1137-38; *Barnett,* 228 F.3d at 1114-15. Employers who fail to engage in the interactive process in good faith face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible. *Humphrey,* at 1137-38.

Prior to March 1996, Appellant operated under what was referred to as an informal solution. She was permitted by her supervisors to come in late and stay late to make up the time she missed. TR 30. However, as the AJ found, the Appellant's attendance difficulties increased after the March 1996 meeting and the restrictions that followed the next month. Initial Decision at 40. Despite Appellant's insistence that her absences or tardiness were not willful, the Agency continued to deal with the situation as a behavior problem that could be resolved if she would simply try harder. Appellant provided medical evidence of her depression and its relation to her inability to wake up in time to get to work. The medical evidence was almost never deemed sufficient, often because the doctors did not suggest accommodations. *See, e.g.,* R.Ex. 80. Yet, when the doctors did offer suggestions for accommodation, the managers rejected them. In one

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[13] *Humphrey v. Memorial Hospitals Ass'n, supra*, is remarkably similar in its facts and issues to the instant case. In that case, the Court held for Appellant because the employer had not met its responsibility for providing reasonable accommodation. The Court stated that the failure of the Appellant to request a specific accommodation did not exempt the employer from providing one where a reasonable accommodation existed and the employer could not demonstrate undue hardship. 239 F.3d at 1137-38. The Court also found that the employer had improperly denied an otherwise reasonable accommodation because of past disciplinary action taken due to the disability in question, specifically, that the "disciplinary record does not constitute an appropriate basis for denying . . . [the employee] a work-at-home accommodation." *Id.* at 1137.

case Mr. Schulz testified that he interpreted the suggested accommodation as telling him, "[d]o whatever she asks." TR 175. Mr. Schulz also testified that he believed it was Appellant's responsibility to follow up with questions of the doctors to clear up Management's concerns about the medical reports. TR 163-64. Appellant's inability to comply with the requirement that she perform her duties during the core hours at the workplace resulted—not in an effort to seek accommodation—but in further restrictions and discipline. There was never an effort to engage in the required interactive process.

Appellant, who had previously met or exceeded expectations in performing the essential functions of the position, could not meet expectations following Management's insistence that she comply with the policy that required employees to be in the office during core hours. Thus the core-hours policy became the workplace barrier for which Appellant sought accommodation. Management in this case adopted a position of resistance toward Appellant because it believed, despite the medical evidence, that Appellant could conform her behavior to its policies if enough pressure were put on her. *See* TR 346-48. From March 1996 until Appellant's termination, the Agency did not act in good faith in attempting to identify and provide accommodation to Appellant. *See Taylor v. Phoenixville Sch. Dist.,* 184 F.3d 296, 319-20 (3d Cir. 1999).

**Conclusion**

For the reasons set forth above, the Board concludes that GAO violated the Americans with Disabilities Act by failing to accommodate the known disability of Appellant. As a result of the failure to accommodate, Appellant resigned her position on the effective date of her removal for chronic absenteeism and failure to follow leave restrictions. Accordingly, the Agency's decision to remove Appellant is reversed and Appellant is entitled to cancellation of her separation from the Agency. Appellant is entitled to reinstatement retroactive to September 19, 1997. She is entitled to such relief as is necessary to restore her to the *status quo* had the Agency not failed to accommodate. Any entitlement to back pay must be adjusted to account for her disability retirement payments received since that time.

**SO ORDERED.**

Member Jeffrey S. Gulin respectfully dissents from the portion of the Decision that concludes that the Agency failed to provide Appellant a reasonable accommodation.